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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

BRIEF AMICUS CURIAE FOR THE ASSOCIATION OF AMERICAN LAW SCHOOLS IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE FOR THE ASSOCIATION OF AMERICAN LAW SCHOOLS IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed by the Association of American Law Schools with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS

The Association of American Law Schools (AALS) has a membership of 132 law schools, all of which are approved by the American Bar Association. The purpose of the AALS is "improvement of the legal profession through legal education." It participates in developments affecting legal education, serves as a repository of information about legal educa-

tion and assists in developing policy on national issues of legal education.

The Association's interest in this case derives from the impact that this Court's decision will have on legal education and the legal profession. Although the decision of the court below arises from admissions to a medical school, the admissions processes of law schools are sufficiently similar to those of medical schools to be affected directly by any decision in this case. Almost all member schools of the AALS have some form of special admissions program designed to increase the number of qualified members of racial minorities who will enter law school and become members of the bar. The decision of the court below imperils these programs and therefore the progress made in the last ten years to include racial and ethnic minorities[1] in the legal profession. Specifically, if this Court were to hold that professional schools including law schools could no longer take race into account in the admissions process, the result would be to exclude virtually all minorities from the legal profession. Because of their importance to the objective of achieving a multiracial bar, we are committed to these programs. We are convinced that these carefully designed and thoughtfully administered programs represent the only realistic possibility for increasing the very small number of minority group members in the legal profession and that they are fully consistent with the Constitution.

1. Throughout this Brief, the terms "race," "racial," or "minorities," are based upon "standard race/ethnic categories" such as those defined by the Equal Employment Opportunity Commission for its various information reports. See 41 Fed. Reg. 17601-02 (April 27, 1976). They are generally limited to four groups: black, Hispanic (primarily Chicano and Puerto Rican), Asian (including Pacific Islanders) and American Indian (including Alaskan Native). There is some variance among schools about which groups are eligible for inclusion in their special admissions programs because of differing emphasis reflecting the concerns of their geographical service areas. It appears that all include blacks, either Chicanos or Puerto Ricans or both, and American Indians.

SUMMARY OF ARGUMENT

The imposition of a requirement that professional schools forego any consideration of race in making admissions decisions would result in substantially all-white law schools. It is for this reason that almost all accredited American law schools have adopted "special admissions programs" which give preference in admissions to blacks and members of other "discrete and insular" minorities. As a consequence, in a little over a decade the law schools have increased their enrollment of minority students from 700 or 1.3% (in 1964) to over 9,500 or 8.1% (in 1976). These special admissions programs have thereby sought to increase the number of lawyers from minority groups, a number which is still inordinately small at under 2% of the entire bar.

After over a decade of searching, it is clear to the law schools that there is no alternative available to them, other than the use of race as a factor in admissions, if minority student representation among American law students is to rise above a negligible level. For the stark and unalterable fact is that under today's conditions, if indicators of academic potential were used by law schools as the sole basis for determining admission, "few minority students would be admitted to law school." Despite wishful thinking and facile generalizations to the contrary concerning the means available to professional schools to increase minority enrollment without special admissions, no alternative with any prospect of success has been proposed. Those alternatives which have been suggested would be ineffective and undesirable: they would not result in a substantial enrollment of minority students in the nation's law schools, but they would lead to an abandonment of intellectual promise and academic qualification as the standard by which schools determine whether an applicant shall be admitted.

Special admissions programs are an integral part of the

law school admissions process which is designed to provide the community with the lawyers it needs. Admission to law school is not a prize granted as a reward for the most deserving. Law schools are created and supported by the state to meet its needs for lawyers and legal services. Thus the question which the law schools address in their admissions processes, in the best way they can, is which among the many applicants will best serve those needs of society. In this context, where many more qualified candidates apply than there are places in the schools, that decision has generally been to select those students who show the most potential to succeed in law school subject to other limitations which also serve the community. Thus, in addition to past (undergraduate) grades and test scores, law schools consider an applicant's background as well as his residence in deciding whether to admit him. Background is a factor in obtaining a diverse student body so important to comprehensive education; residence is important to governing boards who seek lawyers to meet local needs.

Reliance on race is a similar limitation used as a factor in the admissions process to serve the community's interests. It is part of the commitment, made clear by this Court in 1954 in *Brown v. Board of Education* and by Congress a decade later in the Civil Rights Act of 1964, toward racial equality and the full participation of racial minorities in American life. That need is as pressing and pervasive today as it has ever been: (1) lawyers play a critical, indeed a crucial role in our society and the inclusion of minorities in the bar is required to achieve their participation in the governance of our society, public as well as private; (2) the existence of race as an important social element means that minority lawyers are needed to serve the legal needs of minority communities who will not otherwise be served as they prefer; (3) racial diversity is vital in the classroom if legal education is to be

effective and not isolated from the individuals and institutions with which law interacts; and (4) the opportunity to be a lawyer is part of a larger effort by the nation to improve the conditions of life of its least advantaged citizens. The special admissions programs in the overwhelming majority of American law schools are a direct response to these and similar needs. Unless allowed to continue, these needs and the nation's need for minority lawyers will go unmet.

The equal protection clause of the Fourteenth Amendment should not be construed to require that the law schools of the country abandon special admissions programs so essential to achieving these compelling objectives. These programs are aimed with precision at their objectives of racially integrating law schools and substantially increasing the number of minority lawyers. They meet the most exacting constitutional standard and are necessary if law schools are to serve these compelling state interests. These programs also support the concept of equality and give meaning to the opportunity which equal protection is designed to serve.

INTRODUCTION

The purpose of this Brief is to demonstrate a single proposition: the practice of providing a degree of preference for blacks and other minorities in law school admissions is a necessary, and indeed the only honest method, to achieve certain very important social objectives. Stated more bluntly, a holding that the Constitution requires that the schools abjure any consideration of race as a factor in making admissions decisions must, unless covertly circumvented, result in substantially all-white schools.

The case before the Court is a medical school case. We venture no conclusion as to whether the matters which we here present are applicable to the same degree to medical schools.

But the holding of the court below, that none of the criteria used in selecting among applicants for admission to medical school "can be related to race," may also be equally applicable to schools of law. Our assumption, therefore, is that if the judgment of the court below in this case is affirmed, the publicly-supported law schools of this country will be obliged to conform their admissions practices to the principle that, in selecting among applicants, no consideration may be given to race, either explicitly or by indirection.

The imposition of such a requirement would require changes in the admissions practices used by the vast majority of the accredited American law schools. Most of them have, in one way or another, and under various names and guises, adopted "special admissions" programs: practices which give preference in admissions to blacks and members of other "discrete and insular" minorities. The result is that for each of those schools there can be found unsuccessful applicants, such as the plaintiff in this case, who rank higher on the numerical admissions criteria used by that school than other applicants who have been admitted because they are members of a racial minority. The object of this Brief is to demonstrate that such a result is the necessary consequence of a program designed to meet certain imperative social needs directly related to the purposes for which the schools exist and that there is no other reasonable method by which those needs can be met.

The imposition of a requirement that the admission of law school applicants be made without consideration of race would virtually wipe out the progress that has been made toward the goals of an integrated bar and society. In little over a decade the law schools have increased their enrollment of minority students from 700 or 1.3% to over 9,500 or 8.1%.[2] The regrettable but unalterable fact is that under today's conditions, if indicators of academic potential without

regard to race were used by law schools as the sole basis for determining admission, "few minority students would be admitted to law school." That is the stark conclusion of an exhaustive study of more than 76,000 applications to law school for the 1975-76 admission year that was confirmed by a separate survey of 80% of all accredited law schools. See F. Evans, *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall 1976* (Law School Admission Council 1977) (hereinafter *Evans Report*). The findings of the *Evans Report* are crucial to an understanding of what is at stake in this case. A detailed discussion of its findings appear at pages 27-32, infra, following a description of the admissions process, which also must be carefully considered if these findings are to be fully understood. For now, we urge only a full awareness of the major conclusions to emerge from the *Evans Report,* that affirmance of the decision below would, under either existing admissions standards or any realistic alternative, exclude all but a minuscule number of minority students from the nation's law schools.

The demonstration of these conclusions comprises the following parts. First, we examine the admissions systems used by American law schools today, without regard to the racial question. This is important because those practices, and the conditions which give rise to them, are quite different from

2. The specific figures for ABA-approved law schools are:

	Total Minority Enrollment	Total Enrollment
1964	700 (approx.)	54,265
1976	9,524	117,451

Source: *Report of Minority Groups Project* in AALS Proceedings 172 (1965); ABA *Law Schools and Bar Admission Requirements: A Review of Legal Education in the United States* 42, 45 (1976).

those, familiar to most members of the bar, that existed only a few years ago. Second, we describe the process by which the practice of providing some preference to applicants of certain minority groups has developed in the context of these new and different admissions standards. An understanding of this process demonstrates that under current societal conditions, conditions that we believe will in time disappear, there is no feasible alternative to the use of some form of racial preference if the presence of a significant number of minority students is to be achieved. Third, we show that the presence of a significant number of law students from these minority groups serves important social and educational purposes that cannot be met under today's conditions in any other way. Finally, and in conclusion, we add a few words as to why we believe the Constitution does not require that the law schools of the country abandon programs so essential to achieving these compelling objectives.

I. WITHOUT MINORITY ADMISSION PROGRAMS MINORITY STUDENTS WOULD BE EXCLUDED FROM AMERICAN LAW SCHOOLS

An adequate appreciation of the devastating impact that affirmance of the decision below would have upon minority enrollment in law schools depends, initially, upon an understanding of how admissions decisions are made, the facts upon which they are based, and the purposes they serve. The failure of such understanding can lead, as in the opinion below and in the dissenting opinion of Mr. Justice Douglas in *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974), to faulty diagnoses of the problem that special admissions programs address and to facile generalizations concerning the means by which it can be solved. Both opinions assume that means exist by which law schools (or medical schools) can, by somehow altering their admissions criteria, maintain substantial

minority enrollments without consideration of race. An understanding of the admissions process will demonstrate that this assumption is based upon wishful thinking in ignorance of the facts.

There is a second reason why it is important to understand the selection process of law schools. A tendency exists to regard admission to law school as a prize to be awarded in accordance with some principle of desert. But the goal that law schools seek to serve in the admissions process is not that of rewarding those applicants who are most deserving; admissions are not simply handed out as awards for prior performance. Rather, law schools exist to provide the community with the lawyers it needs to serve its many purposes. The question to which the schools therefore address themselves, in the best way they can, is which of the multitude of applicants to the school will best serve those needs.

A. The Number of Qualified Applicants Exceeds The Number of Openings In Law School

The drastic change that has occurred in the admissions processes of the law schools over the past few decades can best be described by dividing its development into three stages. The first stage was that era in which there was a place in law school, virtually any law school, for everyone with minimal credentials. Any applicant with a college degree from an accredited institution, and indeed many without, could find a place. Competence to perform as a law student was tested in the best possible way—by performance itself. Those who demonstrated the minimum competence required by the particular school were passed and those who did not were washed out.[3]

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3. The situation as it existed in 1948-49 is graphically described in L. Nicholson, *The Law Schools of the United States* (1958), a report based on 136 questionnaires and inspections of 160 law schools prepared for the

Such a system is operable, however, only when there are places available in law school sufficient to accommodate all those possessing the minimal educational qualifications. When applications exceed the places available, some criterion of selection is required. The most natural criterion, and the one actually adopted by the law schools, was probable success in completing the course of instruction. This is the second stage in the development of the admissions process, the stage at which the Law School Admission Test (LSAT) was developed as a tool for aiding predictions as to whether an applicant, if admitted, would be able to meet a school's minimum level of performance. Since the demand for admission as compared to the available places varies from school to school, different schools reached this stage and began using the LSAT at different times.

When there are more competent and qualified applicants than there are available positions the question becomes which applicants, of the many who would be likely to succeed, should be admitted. At this third stage, reached by different schools at different times, the demand by qualified applicants for admission to law school far exceeds the number of available positions. All or nearly all law schools are now at this stage. Thus, in 1975, there were approxi-

ABA Survey of the Legal Profession. In 1948, 87% of the applicants to the schools surveyed met the schools' minimum requirements and 70% of the applicants were accepted. Id. at 217. Descriptions taken from three inspection reports typical of the "vast majority of schools," were as follows:

> "All qualified applicants have regularly been admitted to the law school in recent years."
>
> "The school does not attempt to screen applicants over and above the determination that they have complied with the minimum qualitative and quantitative requirements."
>
> "In the year 1948-49, 190 students entered upon the study of law in this school; only 91 remained in school at the beginning of the following year. Forty of the 190 were flunked out, and 59 others quit voluntarily, most of them persuaded so to do because of low grades."

Id. at 26.

mately 83 000 applicants for law school admission for the 39,038 first-year places opened for them in all ABA-approved schools that year. There were, in short, at least two applicants for each law school seat in the United States.[4]

Confronted with the necessity of choosing from among so many fully qualified applicants, almost all schools attempt to select, subject to the qualifications discussed below (pp. 18-20, infra), those applicants who are most likely to perform best academically. The object, in other words, is no longer to identify those students who can earn a C, but those who are most likely to earn As and Bs.

In using that standard for admission, the schools are guided by the assumption that those who perform well in law school are as a general rule likely to perform well in the profession. We know, of course, that this assumption is at best only a rough approximation. Law schools are concerned primarily with developing intellectual qualities—analytic skill, the mastery of legal concepts, and the ability to work imaginatively with those concepts—that are important in all the roles that lawyers may be called upon to perform. But it is plain that there are additional qualities that are also

4. White, *Legal Education: A Time of Change*, 66 A.B.A.J. 355, 356 (1976) (based on LSDAS completions; the LSDAS column therein erroneously reports for each year the following year's data.)

Law School Data Assembly Service (LSDAS) completions understate the number of college graduates applying to law school. In 1975, there were 133,000 LSAT administrations, 50,000 more than the number of registered applicants in LSDAS. Some of the difference is accounted for by "repeaters," students taking the test for the second time. Some of the difference reflects potential applicants who were dissuaded from completing the application process by low scores and some applicants were not required by their law schools to register in LSDAS. This does not, however, convey the full dimensions of the problem confronted by individual schools, especially those perceived by applicants as most desirable. It is not uncommon for law schools to receive as many as ten or fifteen applications for each position in the first-year class, the largest number of which are by applicants who would, it can be predicted with a high degree of certainty, successfully complete the school's academic program.

important, qualities that may well be different for the jury lawyer, the appellate specialist, the counsellor and advisor, the negotiator and the legislator.

In making admissions decisions, however, law schools are not able to address the full range of these qualities that go into the making of a successful lawyer because there are no reliable guides, at least yet,[5] to the attributes of a "successful lawyer." Given the necessity of selection, a choice is therefore made in terms of a standard that the law schools can measure and apply, the expected performance of the applicant in school.

B. Numerical Predictors Indicate Which Applicants Are Most Likely To Succeed In Law School

Central to any understanding of the process by which law schools ration the available spaces among qualified applicants is the role of the quantitative predictors.

We have already mentioned the LSAT. It was first used in 1948. Since that time the test has been the subject of an enormous volume of research under the sponsorship of the Law School Admission Council (LSAC) which consists of a representative from each school using the test (today identical with the list of ABA-approved schools). This research, now compiled in Law School Admission Council, *Reports of LSAC Sponsored Research*, vols. 1 & 2 (1976), covering 72 separate research projects, has been dedicated not only to scrutiny of the validity of the LSAT and its component parts and to improvement in its content and structure but also to

5. A major effort to study the relationships of predictors and success in practice was begun in 1973 with the inauguration of the Competent Lawyer Study, a joint project of the Association of American Law Schools, Law School Admission Council, American Bar Foundation and National Conference of Bar Examiners. The purpose of the study is to learn how to identify, measure and predict the factors that go into performance as a competent lawyer.

the search for other possible predictors of law school performance.[6]

Some of the results of that research are worth noting. We know, for example, that the test is not racially biased. Five separate studies have indicated that the test does not underpredict the law school performance of blacks and Mexican-Americans.[7] We know that it is not sexually biased.[8] We know, even, that it predicts as well for Canadians as it does for Americans.[9] We know that questions designed to measure an applicant's general background knowledge, which

6. For a summary of the result of this research, see Hart & Evans, *Major Research Efforts of the Law School Admission Council*, in Law School Admission Research (LSAC 1976).

7. Schrader, Pitcher & Winterbottom, *The Interpretation of Law School Admission Test Scores for Culturally Deprived and Non-white Candidates*, LSAC 66-3, in 1 Law School Admission Research 375 (1976); Flickinger, *Law School Admissions and the Culturally Deprived*, printed with Schrader & Pitcher, *The Interpretation of Law School Admission Test Scores for Culturally Deprived Candidates: An Extension of the 1966 Study Based on Five Additional Law Schools*, LSAC 72-5, in 2 Law School Admission Research 227 (1976); Schrader & Pitcher, *Predicting Law School Grades for Black American Law Students*, LSAC 73-6, in 2 Law School Admission Research 451 (1976); Schrader & Pitcher, *Prediction of Law School Grades for Mexican American and Black American Students*, LSAC 74-8, in 2 Law School Admission Research 715 (1976).

Research has also been done as to whether there is any possible source of bias in the "speededness" of the test, i.e., the question whether minority candidates may not finish the test in as large a proportion as whites. The first study indicated that, although speededness had a slight affect on scores, there was no differential in that effect. Evans & Reilly, *A Study of Speededness as a Source of Test Bias*, LSAC 71-2, in 2 Law School Admission Research 111 (1976) and in 9 J. Educ. Measurement 123 (1972). A second, extended study confirmed the absence of any differential effect. Evans & Reilly, *The LSAT Speededness Study Revisited: Final Report*, LSAC 72-3, in 2 Law School Admission Research 191 (1976).

8. Pitcher, *Predicting Law School Grades for Female Law Students*, LSAC 74-3, in 2 Law School Admission Research 555 (1976).

9. Angoff & Herring, *Study of the Appropriateness of the Law School Admission Test for Canadian and American Students*, LSAC 71-1, in 2 Law School Admission Research (1976).

were at one time included in the test, but have since been abandoned, add nothing to its predictive value.[10] We know that it is a useful and valid tool but that there is another indicator of almost equal validity—the undergraduate grade-point average (GPA). And we know, finally, that these two indicators combined constitute the best predictors of law school performance that we have been able to devise.[11]

The validity of the LSAT, the GPA, and their combination as predictors is under constant scrutiny. Most schools which use the LSAT submit, usually once each year, the performance of each of their students in the first year as measured by grades. This record of performance is then measured against the LSAT and GPA of these students. A determination is made as to the correlation of each of these predictors, and of both combined, with performance; in addition each school has a predicted index (or index number) pre-

10. Carlson, *Factor Analysis and Validity Study of the Law School Admission Test Battery,* LSAC 70-3, in 2 Law School Admission Research 11 (1976).

11. Efforts to find a consistent and systematic correlation with other factors in order to improve the effectiveness of the combination of LSAT and GPA have proved fruitless. Studies have been made, for example, of the utility of factoring in the quality of the undergraduate schools as measured by the average LSAT scores of their graduates. This has not proved effective in increasing the predictive power of the LSAT and GPA combined. Schrader & Pitcher, *Adjusted Undergraduate Average Grades as Predictors of Law School Performance,* LSAC 64-2, in 1 Law School Admission Research 291 (1976); Schrader & Pitcher, *Effect of Differences in College Grading Standards on the Prediction of Law School Grades,* LSAC 73-5, in 2 Law School Admission Research 451 (1976). Until recently a separate weight was given to the score on the writing ability (WA) portion of the LSAT but this was abandoned when it was found that it added little. At one time it was thought that taking account of undergraduate major or using the improvement in grades over the undergraduate career, rather than simply the three-year average, would improve prediction. They did not. Reilly, *Contributions of Selected Transcript Information to Prediction of Law School Performance,* LSAC 71-4, in 2 Law School Admission Research 133 (1976); Reilly & Powers, *Extended Study of the Relationship of Selected Transcript Information to Law School Performance,* LSAC 73-4, in 2 Law School Admission Research 405 (1976).

pared for it in evaluating applicants in the succeeding year based on the accuracy of the predictors in prior years.[12]

12. These studies not only validate the use of the composite of LSAT and GPA by each school but, in addition, they also provide each school annually with predictive formulas showing which combination of the two (LSAT and GPA) have the highest validity based on performance at that school in that year and in the three most recent years combined, as well as one based on the experience of all law schools put together. The school can choose whichever of these formulas it desires, or any other combination it desires and, in the succeeding year ETS, through the Law School Data Assembly Service (LSDAS), provides the school with an index, based on the school's specified formula, of each applicant's predicted performance.

An illustration may be helpful. Assume that a study of the 1975 entering class at a particular school reveals that the grades earned by the members of that class would have been best predicted by a formula that sums the LSAT score and the product of 135 times the GPA. (Since LSAT is scored on a 200-800 scale and GPA on a 4-point scale the assumed formula involves a determination, today generally accurate, that the LSAT is a somewhat better predictor than the GPA.) In the following year, i.e., for applicants to the class of 1976, the LSDAS will, using that formula or any other requested, provide an index number for each applicant. This can, if requested, be given in terms of the particular school's grading system. This is the predicted first-year average (PFYA or PGA) referred to in the brief filed by the deans of the four publicly-supported California law schools in support of the petition for certiorari.

Such predictions are, however, only statements of probability and hence are necessarily imperfect. The degree of probability is expressed in a correlation coefficient. A school whose index number has a correlation coefficient of .45 and which admitted 100 students would normally expect to find that at the end of their first year, 8 of the top 20 who had the highest index numbers would be in the top 20 students. But the top 20 students would also include 1 or 2 whose index numbers were in the bottom 20% of those admitted. Conversely, 8 of the students with the lowest index numbers, and 1 or 2 of those with the highest, would probably be represented in the bottom 20% of the class. Finally, it is worth pointing out that a majority of both the highest ranking 20% and the lowest ranking 20% of admitted applicants are likely to end up in the middle 60% of the class. See *LSAT Handbook* 47 (1964).

Over the past few years, the correlation between the index number employed by most schools and the performance of their first-year students has ranged between .3 and .5, with some as high as .7. The mean validity is .45. Because a .45 correlation can be said to mean that the index accounts for only 20% of the rank order of student performance, there are those who have argued that the correlation of LSAT and GPA with law school performance is so low as to make the use of these predictors unnecessary or undesirable. One answer to that argument is that, though far from perfect,

None of this is meant to suggest that the law schools of this country should, or do, rely entirely on the numerical indicators. While on average they are valid and reliable, they state in essence only a probability of relative performance. The probability that a selection based on these predictors

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the combined LSAT-GPA index is the best predictor available. Extensive efforts to use interviews or other subjective methods of evaluation of candidates for law school have never proved valid when tested against actual performance. See Linn & Winograd, *New York University Admissions Interview Study*, LSAC 69-2, in 1 Law School Admission 547 (1976). This is in accord with the available scientific evidence that predictors such as the LSAT are in general likely to be more accurate than subjective evaluation. The greater efficiency of the combination of LSAT and GPA is explained by the fact that the latter may measure motivation and study habits, factors not measured by the LSAT.

Moreover, the argument that a .45 correlation is too low to justify use of the index fails to take account of the phenomenon technically known as "range restriction" and thereby understates the utility of the index as a predictor. "Range restriction" can be illustrated by a simple example. It is a fact that there is a very strong relationship between the height and weight of human beings. If a randomly selected sample were taken, the correlation coefficient between these two quantities would be very high. There are a few short but very heavy people and a few tall bean poles, but on the average it is true that the taller a person is the more he weighs. But it is also true that as the differences in height decrease the correlation decreases: it is much less certain that a person 6'1" tall is heavier than one who is just 6' than it is that a 6' person is heavier than a 5' person. A correlation coefficient of height and weight among, let us say, professional basketball players would therefore be much lower than one in which the population as a whole were being measured.

Just so with law school admissions. Since almost all American law schools tend to select those who have the higher scores, the correlation coefficient is very much lower than it would be if all who applied were admitted. The greater the weight given to the index in admissions the lower the correlation coefficient. But the drop in the correlation coefficient says nothing as to the efficiency and effectiveness of the index as a discriminator between those accepted and the vast majority who are rejected—it measures only the efficient use of the index in predicting the relative position of those accepted. The "range restriction" phenomenon at least partly explains the difference between the relatively high correlation coefficient of .67 for the University of California at Berkeley (Boalt Hall) and the more typical .45. Although Boalt Hall accepts only a small proportion of those who apply to it, including minorities, it does have a larger "special admissions" program than most schools and therefore exhibits a somewhat smaller "range restriction" effect.

will in fact select the candidates who will perform best is very high if the difference in the indices is large but it is low when the indices are similar. Given the large volume of applications the ultimate decision may have to be made among applicants who have very similar index scores. It is for this reason, among others, that the schools generally use those predictors in combination with other information that they have about applicants. We now turn to the process by which they do so.

C. The Admissions Process Is Designed To Identify Which Of The Qualified Applicants Should Be Admitted

Although the specific procedure varies from school to school, the following describes in general terms the main features of the regular admissions process at most schools.

The first step is to reduce the number of files that can be given detailed examination to a manageable number. This is done on the basis of the index numbers except where quick examination of the file indicates that, for some reason, the numbers are not indicative of probable performance. Those having the highest indices are admitted and a larger number are denied, not because they are unqualified, although some may be, but simply because their performance as predicted by the index will probably be lower than that of the group to be given detailed examination. After this initial screening, then each school, in its own way, attempts to make the best possible prediction as to the relative quality of the applicants. Everything that is known about them is taken into consideration: the applicants' personal statements, their work histories, the nature of the subjects taken in undergraduate college, differences in the kind of education provided by different colleges or differences in grading standards between colleges, the trend of an applicant's undergraduate grades, the possible effect of a disadvantaged

background upon the validity of the predicted performance, and every other factor that the particular school thinks can possibly be utilized in making a judgment as to the relative quality of the applicants.

The admissions process thus involves more than the use of test scores and grades.[13] All, or virtually all schools use whatever information they believe, in the best exercise of their professional judgments, will indicate the relative ability of the applicants to perform in law school. Whatever factors a particular school considers, it seeks to pick the most promising candidates from among those who apply for admission to it.

The last statement is subject to an important qualification. The effort of each school to identify and select those applicants most likely to perform successfully is subject to certain overrides. The first of these is the desire for diversity. Faculties generally believe that a process that produces a homogeneous student body, all of the members of which share a common history, is unlikely to provide an atmosphere for effective education in the law. Thus, an admissions committee is likely to give preference to diverse backgrounds and experiences, perhaps selecting an experienced businessman, a prison guard, a psychiatrist or a newspaper reporter over a recently graduated college senior who would be likely to perform better academically.[14]

13. Almost all schools admit students other than "on the numbers." This can be seen dramatically by inspecting the profiles of admissions at almost any school as shown in the *1976-77 Prelaw Handbook*. One school, for example, rejected 15 of 94 applicants in 1976 who had LSAT scores between 650 and 699 and also had undergraduate grade point averages between 3.50 and 3.74. But it accepted 32 applicants who had LSAT's below 600 *and* undergraduate grade point averages below 3.49. These figures exclude admissions under what that school calls its "special experimental" program. Id. at 237.

14. See, e.g., *Columbia University Bulletin, School of Law*, 96-97 (1976). The procedure used at the University of Virginia School of Law is typical:

Another override typical of most state-supported schools is a mandated preference for residents of the state, usually expressed as a maximum percentage of the students not registered in the state who may be admitted. Such a preference serves at least two purposes—increasing the opportunities for professional education for those whose families support the institutions and increasing the likelihood that graduates of the school will remain in the state to meet its needs for legal services. The effect of the preference is, of course, that the school will be required to reject some nonresidents who would be likely to perform more successfully than some residents who are admitted.

The final override, and the one this case is about, is race. The plain fact of the matter is that were it not for this override the admissions processes of the nation's law schools, taking into account all of the factors we have described, would produce very few students who are members of racial

> Even in dealing with the large application volume, encountered during the last several years, the admissions committee believes that absolute standards based on a combination of LSAT score and undergraduate grade-point average (GPA) are not the best way to select an entering class. Consequently, the committee considers a broad array of elements in addition to the essential factors of LSAT and GPA, with a view toward assembling a diverse group while at the same time arriving at a fair appraisal of the individual applicant.
>
> Because of this approach it is difficult to predict what action may be taken on an individual application. The LSAT score and undergraduate GPA constitute the bulk of the committee's consideration; usually about 80 percent total weighting is accorded these two factors. However, there are other elements taken into account; the maturing effect of an individual some years away from formal education; a rising trend in academic performance versus solid but unexceptional work; financial pressure requiring employment during the undergraduate years; significant personal achievement in extracurricular work at college or in a work or military situation; unusual prior training which promises a significant contribution to the law school community. Other, similar factors are also considered.

University of Virginia Record 1976-77, School of Law, 55 (1976). A more complete report of the factors used and the admissions process relied on at another school appears at 28 J. Leg. Ed. 363, 378 (1977).

minorities. This has led to the creation of "special admissions programs" designed to produce decisions different from those that would be produced if the process were conducted in a racially neutral way.

Each of the overrides has a purpose. Single-minded devotion to predictions of probable academic excellence undoubtedly would increase the number of graduates who possess the highest levels of the intellectual qualities important to the practice of law, but that is not the only purpose for which a law school, particularly a state-supported law school, exists. If a single standard of probable performance is used, a defined group having lower levels of predicted performance may be entirely excluded, even though many in that group will perform as well or better than those admitted. The only solution, if this result is to be avoided, is to apply a somewhat lower standard for that group but one which will still assure a high probability of success.

These overrides are not without cost. First, since the best predictors express only probabilities, a higher percentage of those in the preferred group may encounter academic difficulties (although it is impossible in advance to say which ones). Second, the use of different standards for different groups means that some well-qualified applicants who would otherwise be admitted will be rejected. But those costs are balanced by the cost of the alternative—namely, the denial of admission to well-qualified residents and minority applicants because the school has selected only those who are most certain to succeed.

There is, in short, no free lunch. As long as the number of qualified applicants exceeds the number of persons who can be admitted, some applicants must suffer the disappointment of being denied admission. Under fair procedures that determine which applicants do (and do not) meet the school's admissions criteria, the only issue of law is whether the admissions criteria employed advance permissible public policies. The mere fact, regrettable as it may be, that some qualified applicants have been denied admission is not relevant to that issue, for that result is inevitable under any criteria.

Our description of the admissions process has been offered to underline the proposition that, subject to the overrides specified, each law school decides whether to admit or reject the thousands of applications received on its best estimate of the relative performance of the applicants to that school as law students. The focus of the admissions decision is not on which of the applicants is the most deserving but, if you will, on the product: which of the applicants will best serve the purpose for which the school was created, that of supplying professionals needed by the community. Preferences based on residence or on the desire for diversity in the student body are clearly related to that purpose. Preferences for members of certain minority groups equally serve that purpose. This brings us directly to the question of race.

D. The Use of Race as a Factor In The Admissions Process Is Necessary If There Are To Be A Substantial Number Of Minority Students In Law School

Our consideration of the use of race in law school admissions is in three parts. We first set out in brief compass, and in fairly general terms, the history and the nature of special admissions programs used by law schools to integrate their student bodies. Next we consider what the impact would be of a forced abandonment of these programs designed to increase minority enrollment in law school. What, in other words, would be the effect of a race-blind system of admission upon the racial mix of applicants who would be admitted to the schools if they adhered to current admissions criteria of probable academic success and diversity (excluding of

course, racial diversity). Finally we explain why there are no reasonable alternatives to reliance on the race-conscious admissions procedures if minority admissions are to be at more than a token level and why the proposed racially neutral solutions, including those suggested by the Supreme Court of California, are not grounded in reality or logic—and merely invite schools to adopt an approach we reject as unworthy and inappropriate, the institution of disingenuous programs whereby race is taken into account covertly.

1. The Special Admissions Programs

Responding to the moral pressures of the civil rights movement, first led by this Court, which was sweeping the country in the mid-1960s, the law schools began in a variety of ways to take affirmative steps to attain more than a token enrollment of minority students.[15] There were, in 1964, only 700 black students in all the accredited law schools of the country—1.3% of the total enrollment of more than 54,265—and 267 of them, more than a third, were enrolled in what then were essentially segregated black schools.[16] In all of the other accredited schools in the country, then, fewer than 200 were being admitted each year. Plainly something had to be done.

The first pattern to emerge was an active program by the law schools to recruit minority, that is primarily black, students. Since the profession had historically been all but closed to blacks, these students had first to be persuaded to consider law as a career and then to enroll. Many methods of recruiting were used. The Law School Admission Council (LSAC) sponsored visits to black colleges and with black

15. The history given here can be traced in the voluminous reports published in Symposium, *Disadvantaged Students and Legal Education—Programs for Affirmative Action*, 1970 Tol. L. Rev. 277.

16. *Report of Minority Groups Project* in AALS Proceedings 172 (1965).

student groups; the LSAT was administered to minority students without charge; summer programs were held, first at Harvard Law School in 1965, and then elsewhere, to give college students an understanding of what law study might involve; and scholarships were offered especially for minority applicants to overcome the financial hurdles that seemed to dissuade so many.

Implicit in these first programs to recruit and enroll minority students was the relaxation of admission standards for them. For at the same time that the law schools were seeking to admit increasing numbers of minority students they were also being deluged with increasing numbers of applicants of all backgrounds. Law was becoming a more attractive field to all sorts of students and, as previously described, the number of highly qualified, indeed exceptionally qualified, non-minority students was growing disproportionately. Law schools, as a result, were seeking to increase minority student enrollment at the same time that they were first having to ration their available spaces by selecting all students on an increasingly higher standard—and unless something were done, it would be the minority group students once again who would be squeezed out.

At most schools the solution was to return, in effect, to what we have previously called the second stage in the development of the admissions process. (See p. 10, supra.) The clock was, in effect, turned back for applicants from minority groups and all of those who were deemed to be qualified were admitted. That is to say, minority students were admitted under these special admissions on the standards which had been used by these very same schools in the late 1950s or early 60s.

The schools accomplished this in a variety of ways. In a few, an explicit minority admissions program was established. In others, it was disguised as a program for the disad-

vantaged. In still others, the action took place but no public statement was made concerning the existence of differential admissions standards. In recent years, more and more schools have identified their special admissions programs publicly as they more fully understood the process and realized that no alternatives were available. Thus, by the mid 1970s, in virtually all schools, in one way or another, a preference in the application of admissions standards was in fact afforded to applicants from minority groups.

At the same time the law schools began adopting special admissions programs, efforts were made to improve minority student preparation for law study, in summer studies before law school and assistance programs while in school. The preparatory programs had mixed results. Harvard's program in 1965 and 1966 included a few college graduates, and New York University's pre-law program in 1966 and 1967 sought to introduce students to the fundamentals of legal study and to prepare them for the law school curriculum. At the same time Emory Law School began a "pre-start" program whereby a dozen students from nearby black colleges were recruited to take one regular law course in the summer before their first year. If they passed, they were then admitted to Emory as regular students except that they were on a lighter course load during their first year. But programs such as these were expensive. Harvard had to abandon its program after being unable to obtain adequate funding in 1967 and New York University concluded after two summers that the results were so meager as not to justify the cost.

It was at this point that the AALS, the LSAC and the national bar associations, the American Bar Association and the National Bar Association, supported by the Office of Economic Opportunity and the Ford Foundation, formed what was called CLEO (the Council on Legal Education Op-

portunity) to provide summer training for disadvantaged minority pre-law students and to provide financial support for these students once in law school. It began with four national institutes in the summer of 1968 and has continued in one form or another (now relying solely on congressionally appropriated funds received through HEW) to the present day.

Students admitted are those who in general would not be admitted today to law school, even under special admissions programs, without an opportunity to pretest their ability to do law school work in a summer institute. That is, their numerical credentials are such that under the elevated standards forced by increased applicants, law schools generally would turn down the applications of these minority applicants because of low LSATs and GPAs. These summer institutes are designed to be alternative predictors of success, and the admission of these students into law school is generally conditioned by the schools on the students' successful completion of a summer institute. CLEO also has supported these students during their entire law school careers.

CLEO is only a partial response, however. First it is costly and could not be sustained without government support. More important for this case is that it generally supports students whose credentials are such that they could not be admitted in the schools in which they are enrolled even using second-stage standards. Thus as a matter of policy CLEO does not support the most promising minority students on the theory that the law schools having special admissions programs will admit these (more qualified) students without the aid of an expensive summer institute's experience and that adequate financial assistance can be obtained for them from other funds. It is, in other words, a deliberate federally-supported program to increase the pool of minority students attending law school beyond those who

would otherwise be admitted in minority admissions programs.

At the initial stage these special admissions programs had difficulties which we discuss later. Over time, however, the fact that law was now open to minorities that had heretofore been almost totally excluded, plus the first effect of the improvement in elementary and secondary education resulting from this Court's decision in *Brown*, caused an improvement in both the number and the quality of the applicants from these groups. This has led to refinement of the programs. Originally, the effort was to find and recruit minimally qualified minority applicants. As the number and the qualifications of minority applicants increased, it often became necessary to put a ceiling on the number enrolled in them. This "quota," so called, is neither a limit on the number of minority students to be admitted nor, on the other hand, a guarantee that a number equal to this limit will be admitted irrespective of qualification. It is simply a limit on the portion of the school's resources which will be devoted to the program, similar to the limit which a school may put on the number of nonresidents to be admitted. The result, in either case, is the existence of essentially two admissions processes, each competitive within itself and not competitive against the other.

The premise of these special admissions programs is that, in time, they will disappear. They are essentially a transitional device to correct a time lag. It would be naive to suppose that the cumulative effects of centuries of deprivation will be overcome in the space of a few years. But when the need which brought the special admissions programs into being disappears they will be terminated. It is to the schools' interest that this occur. Each is dedicated to attaining the highest possible level of achievement in its student body. Special admissions programs represent a compromise with

that goal, a compromise made necessary by the schools' almost universal perception of a pressing societal need to provide more minority lawyers than can possibly be produced without them. But as the number of unrepresented minorities who can gain admission through the regular procedures increases, the necessity for that compromise will disappear.

An example, the only one we now know, is provided by the elimination of Japanese-Americans from the special admissions program at Boalt Hall, when that faculty found, after a few years' experience, that members of that group were gaining admission in substantial numbers through the regular procedure.[17] The appropriate time for the eventual elimination of the programs, insofar as we can now determine it, is still far in the future for blacks and Chicanos. The success of the programs thus far, even with their mistakes, should not obscure the fact that under today's conditions their elimination would be a disaster. To that question we now turn.

2. Minority Students Would Be Almost Eliminated From Law School Without Special Admissions Programs

The unpleasant but unalterable reality is that affirmance of the decision below would mean, for the law schools, a return to the virtually all-white student bodies that existed prior to the Civil Rights Act of 1964 and subsequent congressional enactments which, after so many years of default, finally committed the nation to the goal of racial equality. More specifically, as a result of the programs described in the preceding pages, 1700 black and 500 Chicano students were admitted to the Fall, 1976 entering class of the nation's law

17. *Report on Special Admissions at Boalt Hall After Bakke*, 28 J. Legal Ed. 363 (1977).

schools.[18] They represented 4.9% and 1.3%, respectively, of the total of 43,000 who were admitted.[19] If the schools had not taken race into account in making their admission decisions, but had otherwise adhered to the admission criteria they employ, the number of black students would have been reduced to no more than 700 and the number of Chicanos to no more than 300.[20] It is virtually certain, however, that the reduction would have been much greater and it is not at all unlikely that even this reduced number would have again been reduced by half or more. Thus, the nation's two largest racial minorities, representing nearly 14% of the population, would have had at most a 2.3% representatation in the nation's law schools and, more likely, no more than about 1%.

These conclusions are drawn from F. Evans, *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall 1976* (LSAC 1977) (the *Evans Report*) which studied characteristics of applicants for admission to the 1976 law school class. The length and complexity of that study preclude any effort to set out its findings and supporting data in detail. We shall, however, set forth briefly the data underlying the conclusions stated in the preceding paragraph and summarize several additional findings that further demonstrate the devastating impact that race-blind admission standards would have upon minority enrollment in law schools.

The ineradicable fact is that, as a group, minorities in the

18. The difference in the numbers of minority students covered by the *Evans Report* and the number actually enrolled is explained primarily by the absence of LSDAS status data from the four predominantly black law schools. See *Evans Report* at 39.

19. The total admitted, as reported in the *Evans Report*, exceeds the actual 1976 law school first-year enrollment of 39,000 because some of those accepted into law school nevertheless did not matriculate. Thus of the 43,000 students admitted to at least one law school, approximately 4,000 did not enroll.

20. *Evans Report* at 44.

pool of law school applicants achieve dramatically lower LSAT scores and GPAs than whites. Illustratively, 20% of the white and unidentified applicants, but only 1% of blacks and 4% of Chicanos receive both an LSAT score of 600 or above and a GPA of 3.25 or higher. Similarly, if the combined LSAT/GPA levels are set at 500 and 2.75 respectively, 60% of the white and unidentified candidates would be included but only 11% of the blacks and 23% of the Chicanos.[21] Such disparities exist at all LSAT and GPA levels. Their effect, under a race-blind system, must inevitably be to curtail sharply the number of blacks and Chicanos admitted to law school.

In 1976, there were more than 80,000 applicants for approximately 39,000 seats in the first-year class. As explained above, pp. 14-16, supra, law schools commonly employ an index number combining LSAT and GPA scores as one means of predicting the probable law school performances of applicants. If all applicants for the 1976 class were to be assigned an index number, computed under two widely-used prediction formulas, the number of blacks in the top 40,000 would have been 370, on one formula, and 410 on the other. The equivalent figures for Chicanos are 225 and 250.[22]

Of course, as discussed above, law schools do not select students solely by "the numbers." Although an important factor in determining who will be admitted to law school, they are not the only one. To determine the number of blacks and Chicanos who would have been admitted to law school under a race-blind standard, it is necessary to estimate how they would have fared if non-quantitative predictors of success (letters of recommendation, experience, etc.) and other

21. Id. at 35.

22. Id. at 49-50.

non-racial criteria affecting admissions (e.g., the school's interest in student diversity) were taken into account. Obviously, this cannot be done. It seems reasonable to assume, however, that if race were not a factor in the admission process, the applications of minorities would be affected by such factors in precisely the same way as those of whites.

On that assumption, the *Evans Report* calculated the acceptance rates for whites for each LSAT-GPA combination.[23] These acceptance rates were then applied to black and Chicano students who had the same combination of LSAT scores and GPAs.[24] On this basis, 700 blacks and 300 Chicanos would have been admitted, a number equal to 40% of the blacks and 60% of the Chicanos actually admitted.

These figures, 700 black and 300 Chicanos, state the outside limit that would have been admitted under a race-blind standard. It is virtually certain, however, that they substantially overstate the number that would actually have enrolled as first-year students. By employing aggregate national acceptance rates, the study in effect treats all law schools as a single school. As the report notes, the implicit assumption of such a procedure is "that minority candidates

23. Illustratively, of those whites who had an LSAT score between 600-649 and a GPA between 3.00—3.24, 83% received at least one offer of admission from a school to which they had applied. Of those who had an LSAT between 550-599 and a GPA between 2.75-2.99, 60% received such an offer. These illustrations, and the full range of calculations set out in the *Evans Report*, demonstrate that, as indicated in our discussion of the admission process, the lower an applicant's quantitative predictors, the lower his or her chance of admission.

24. For example, since 60% of whites who had LSAT scores between 550-599 and GPAs between 2.75-2.99 were accepted by at least one school, it was assumed that the same percentage of blacks with such credentials would have received at least one offer of admission. Since there were 37 blacks in this group, the assumption is that 22 would have received an offer. In fact, 30 of the 37 blacks in this group received at least one offer.

would apply to and be willing to attend" any school.[25] Common sense rebels against any such assumption. Geographical considerations alone are bound to limit a potential applicant's choice of schools. Moreover, the schools to which these 700 blacks and 300 Chicano students would have been admitted are predominantly the least selective law schools in the country.[26] Since those schools lack the financial aid resources of the more selective institutions, a large portion of the high percentage of minority students who require financial assistance would, for that reason alone, be unable to attend the only schools to which they could gain admission.[27]

No one knows with any certainty how far these factors would reduce the number of blacks and Chicanos attending law school below the maximum eligibility figures of 700 and 300, perhaps by 25%, perhaps by 50%, perhaps by more. Since substantially more than half of both black and Chicano applicants were from low-income families,[28] however, and in view of the limitations imposed by geography, a reduction of 50% seems not at all implausible. On that basis, the number of black and Chicano students enrolled in the first-year class in 1976 would have been approximately 1% of the entering class, roughly the same as in 1964. The progress of a decade would have been wiped out.

The drastic impact of an affirmance is also demonstrated by the *Evans Report's* findings that under a race-blind admission standard 12 of the nation's most selective law schools, which during 1975 had total minority enrollment of approximately 1,250, nearly 15% of the national total, would have

25. Id. at 44.

26. Id. at 45

27. Id. at 57.

28. Id. at 29 & 59.

enrolled no "more than a handful of minority students."[29] Yet, these are the schools from which, over the years, many of the leaders of the bar and the nation have been drawn. They are, moreover, the wealthiest institutions and, therefore, those with the greatest resources for the financial aids so sorely needed by many minority students.

The importance of this case to the future of minority student enrollment in the law schools of this country cannot be overstated. If the schools are prohibited from using race as a factor in admissions, minority enrollment will plummet and the hopes of a generation schooled in the traditions of equal opportunity enunciated by *Brown* will be dashed. This becomes even clearer when one examines the possible alternatives that have been suggested and realizes that in fact they offer no realistic prospect of substantial minority enrollments.

3. No Reasonable Alternatives To Special Admissions Programs Have Been Proposed

Arguments have been made from time to time, most notably by the court below and by Justice Douglas dissenting in *DeFunis*, that substantial minority enrollments in professional schools can be maintained without using racial admission criteria. If there are means by which that can be done, they are not known to the law schools. We do know, however, that none of those that have been suggested would work. None would permit the enrollment of minority students in numbers even close to those that now exist and some would, in addition, have a destructive effect upon the quality of legal education and of the profession, requiring law schools to admit students—white and black—who are less qualified to study and practice law than students now being admitted.

29. Id. at 57.

The court below suggested that universities "might increase minority enrollment by instituting aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races. . . ." But as the history recited at pp. 22-33, supra, demonstrates, law schools have already directed precisely such efforts toward minority students. An expansion of these efforts to other groups would not increase the number of minority applicants, but it would enlarge the number of whites in competition with them.[30] Recruitment efforts directed toward minorities have been sufficiently successful so that for the past several years the ratio of law school applicants to baccalaureate degrees granted has been the same for blacks and Chicanos as for whites.[31] There can be no doubt that this growth in the number of minority applicants is directly related to the existence of the special admissions programs. For without these programs, it would have been pointless for most of the minority applicants, including most of those admitted, to have applied to law school at all.

A whole family of other suggestions for maintaining minority enrollments, while avoiding the use of race as an admission factor, depend upon reducing the influence of the quantitative predictors in the admissions process. These range from Justice Douglas' extreme suggestion that the LSAT be abandoned to more moderate proposals that would have the schools place greater reliance on personal inter-

30. Moreover, low income whites perform sufficiently well on the LSAT and GPA to qualify for admission, in substantial numbers, at schools with varying standards. Id. at 63.

31. These ratios are determined by a comparison of the percentage of baccalaureate degrees awarded to minority students with the percentage of law school applicants who are members of minority groups. Compare Altesek & Gomberg, *Bachelor's Degrees Awarded to Minority Students 1973-1974*, at 4 (1977) (baccalaureate degrees) with *Evans Report* at 29 (law school applicants).

views, recommendations, and the like as a way of predicting academic performance and potential contribution to the society. Some of these suggestions rest upon the assumption that the LSAT is "culturally biased," i.e., that it underpredicts the probable academic performance of minority applicants. Five separate studies conducted over the past half dozen years have found that assumption is wrong.[32] In the light of these findings, to call for abolition of the LSAT amounts to a demand that the messenger who brings the bad news be shot or, more accurately, that some other messenger who will bring better tidings be substituted.

For both majority and minority students, the combination of LSAT and GPA, with all their limitations, is the best available predictor of academic achievement, especially at the levels of difference which separate majority and minority applicants in nearly all law schools. If they are, for that reason, to be given weight in the admission process, minority students' nonquantitative predictors of academic performance (such as letters of recommendation) would, on the average, have to be a good deal more favorable than those of whites if the former are to compete successfully for admission. But there is not the slightest reason to suppose that they are; indeed, there is no reason to suppose that such subjective factors are distributed on other than a random basis among applicants of different races. There is, accordingly, no reason to suppose that greater emphasis upon "soft data" would lead to admission of any but a very small number of minority applicants.[33]

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32. See note 7, supra.

33. Ironically, it is this very reliance on unverifiable "soft data" which the equal employment regulations seek to limit. See *Employee Selection Guidelines*, 41 Fed. Reg. 51733 (Nov. 23, 1976) (issued jointly by the Departments of Justice and Labor and the Civil Service Commission); *EEOC Guidelines on Employee Selection Procedures*, 29 C.F.R 1607.1 (1976). See

The same is true with respect to the suggestion that schools should, in the interest of "flexibility" place greater emphasis on factors other than predicted academic performance. Whatever may be the wisdom or unwisdom of such a proposal, there is not a shred of evidence that reliance on any of the non-academic factors suggested would, unless used as a covert methcd of applying a racial preference, greatly enlarge the number of minority admissions. Some greater number of minority applicants might be admitted than if purely academic predictors of success were to be employed, but it is by no means obvious that that would be so. It is entirely possible that an admissions process employing standards as flexible as those suggested by the court below would disadvantage minority students, favoring instead those applicants who ha l letters of recommendation from influential persons, or who were most similar to law school professors and admissions office professionals. And the cost of greatly diminishing the role of the best predictors of academic competence would be so intolerable as inevitably to cause abandonment of the endeavor.

We can put aside quickly the suggestion of the court below that professional schools specifically rely more on "matters relating to the needs of the profession and society, such as an applicant's professional goals" as a method of increasing the number of minority lawyers. If "the needs of the profession and society" are defined, as we believe they must be, to include a need for more minority lawyers, the alternative is no alternative at all but a restatement of precisely the admission program which the court declared unconstitutional. Similarly, if "professional goals" are defined to include an intention specifically to serve minority communities, their use as an admissions criterion may be subject to the same

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also *Rowe v. General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972)(promotions).

attack as the use of the race of applicants in the admissions process. In any event, reliance on the stated goals of applicants for admission is pursuit of a chimera: applicants will inevitably say that which they believe will secure admittance and there is often—we think usually—little relationship between even the sincerely expressed goals of an applicant not yet in school and the professional career eventually pursued.

We need not urge these considerations because there is a far greater difficulty. If the schools are to admit students upon the basis of their stated professional goals, they must inevitably evaluate and rate these goals comparatively. Is it better, for example, to train a lawyer who says he wants to attack corporations or one who seeks to defend them? Is a practice in the field of securities regulation more or less valuable to society than the representation of labor unions? Choices among applicants on any such basis would thrust the schools into an unwanted and unauthorized role of social arbiter. They can properly assess the community's overall need for lawyers; they should not be placed in the position of evaluating those objectives.

Another, superficially more plausible, means that has been suggested for maintaining minority enrollment is to convert special admissions programs into programs for the economically disadvantaged. The underlying theory seems to be that a substantial number of minority group members will gain admission to law schools under such a program because minorities are disproportionately included among the economically disadvantaged. Here again, the theory depends upon ignoring the facts. Although racial minorities are disproportionately included among the economically disadvantaged, approximately two-thirds of all disadvantaged families are white.[34] Even if we were to assume that

34. Bureau of the Census, *Current Population Reports*, Series P-60, No. 103, "Money Income and Poverty Status of Families and Persons in the United States: 1975 and 1974 Revisions" (Advance Report 1976).

disadvantaged minorities would apply for admission to law school in proportion to their numbers, the size of special admissions programs would have to be trebled to maintain the present representation of minorities in law schools. A school that now specially admits 10% minorities would be required to extend its program to 30% of the class.[35] But there is no reason to believe that there would be anything like that proportion of minority applicants presenting credentials equal to those of white applicants with whom they would be in competition.

The best data now available as to the probable composition of any such disadvantaged special admissions program suggest that, among the present pool of applicants, over 90% of those who would be admitted under such a program would be neither black nor Chicano.[36] And even this necessarily understates the problem. However schools advertise their special admissions programs, it is understood that these programs are essentially limited to members of minority groups. But once it is learned that an applicant of any race possessing academic credentials substantially lower than those ordinarily required for admission can gain admission if the applicant shows economic disadvantage, it can be predicted with certainty that two things will happen: (i) there will be a substantial number of unverified and unverifiable claims of childhood economic disadvantage and (ii) there will be a large number of potential applicants who now do not apply who will seek to take advantage of the program.

35. Even if the schools were willing to expand the programs to this extent, their inability to provide financial assistance to so sharply increased a number of disadvantaged students would necessarily lead to a very substantial reduction in the number of minority students, if the programs were to operate in a racially neutral manner.

36. *Evans Report* at 62.

Moreover, one effect of a racially neutral disadvantaged program, as distinct from a minority program, would be to eliminate those blacks and other minorities who now are able to gain admission but who could not reasonably claim a disadvantage other than race. Among minorities, as among whites, applicants who come from low-income families have, in general, substantially lower LSAT scores and GPAs than those who do not.[37] Many of these latter applicants constitute the most promising of those admitted under the present special admissions programs. Yet it is just these applicants who will be denied admission under a racially neutral program for the disadvantaged.

There is, regrettably, one final alternative still to be considered. The suggestion that professional schools abandon special minority admissions programs in favor of programs for the disadvantaged or that they seek to maintain minority enrollments by reducing reliance on quantitative predictors of academic performance may rest upon the premise that either of these alternatives would permit race to be taken into account *sub rosa*. We do not imply that the court below meant to invite such an interpretation of those suggestions, but there are others who have suggested that in the effort to achieve racial equality "we cannot afford complete openness and frankness on the part of the legislature, executive, or judiciary." Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U. L. Rev. 361, 410 (1966). It need hardly be said in response that a constitutional principle designed to be flouted should not be imposed on schools dedicated to teaching the role of law in our society.

37. Id. at 61.

II. SPECIAL MINORITY ADMISSIONS PROGRAMS SERVE COMPELLING SOCIAL INTERESTS

Section I of our Brief has demonstrated that special admissions programs are indispensable if more than a minuscule number of minority group members are to be represented within the student bodies of American law schools. The widespread adoption of such programs reflects the consensus of law faculties that it would be intolerable to have such minimal minority representation in educational institutions that play so important a role in the life of the nation. In this section of the Brief, we identify the reasons that have led to that consensus, and we show that the means relied upon are reasonable and effective.

We observe preliminarily that the justification for special admissions programs cannot be considered in isolation from the historical and social conditions that have created the need for them. The decisions of this Court—from *Dred Scott v. Sanford*, 19 How. 393 (1857) to *Strauder v. West Virginia*, 100 U.S. 303 (1880) to *Brown v. Board of Education*, 347 U.S. 483 (1954) and beyond—amply record the efforts to exclude racial minorities from full participation in American life. Until very recently, racial minorities were almost entirely foreclosed from a role in the nation's public life, not only by excluding them from elective and appointive office in national, state, and local government but, in many sections of the country, by denying them the fundamental rights and obligations of citizenship, including the franchise and the opportunity to serve on grand and petit juries. Their children were required to attend segregated and generally inferior schools. They often received lower levels of governmental services than whites and some services were at times simply withheld from them. In the private sector, minorities fared no better. By custom, and occasionally by law, they were relegated to the least desirable employment, to jobs that paid

substantially less than those open to whites and that offered neither an opportunity for advancement nor a chance to participate in the many important decisions made in the private sector. The housing available to them displayed a similar pattern. Life in the ghetto and the barrio not only deprived minorities of contact with the dominant society, it subjected them to crowding, inadequate public services, and often to housing that failed to meet the minimal standards of our society. The unpleasant but inescapable truth is that, the Constitution notwithstanding, there existed in the United States a virtual caste system.

The legacy of that history is the reality we now confront. Despite the important beginnings that have been made since enactment of the Civil Rights Act of 1964, racial minorities are not—and are not close to being—full participants in American life. By every social indicator they continue to constitute an underclass in our society. Their income, life expectancies, and educational attainments are lower than those of whites. Finally, and of more immediate concern in this case, racial minorities constitute approximately 17% of the total population but, as of the 1970 census, barely more than 1.9% of the membership of the bar.[38]

The nation is now committed to eliminating this legacy of racism. We have undertaken to remove the vestiges of caste from our society, not only by improving the conditions of life among historically disadvantaged minorities, but also by creating a racially integrated society. The question presented in this case is whether, now that we have made that commitment, the Constitution should be construed to forbid measures that are essential to its performance.

There are those who argue that special admissions programs and other measures designed to hasten the integra-

38. Bureau of the Census, *Detailed Characteristics of the Population*, Table 223 (1970).

tion of our society are unwarranted precisely because the nation's commitment to racial equality is so recent. Now that the historic barriers to equality have been removed, they maintain, the members of minority groups may be expected over time to share equally with other Americans in the full range of opportunities that the nation offers to its citizens. The effects of decades, even centuries, of exclusion cannot be overcome in a few years. Thus, they assert, even though the present generation of minority students may not be able to compete successfully for admission to professional schools, there is no reason to suppose that subsequent generations, having received a more nearly equal primary and secondary education, will not be able to do so.

We share the hopes of these critics. Indeed, it is because we believe that the commitment to racial equality in all spheres of American life will eventually eliminate the need for special admissions programs that, throughout this Brief, we stress their transient nature. But the fact that the programs may some day be unnecessary does not mean that they are not necessary now. The United States faces no task more imperative than fulfilling its promise of racial equality. If that promise is to be met, and if those to whom the promise has been made are to accept that it has been made in good faith, we must approach it with a degree of urgency greater than that conveyed by the prediction that equality will come some day.

Any effort to achieve racial equality must, if it is to succeed, begin with an awareness that, in the United States today, race is a socially significant characteristic. Race, in other words, is not merely a superficial aspect of "deeper" social problems such as poverty or inadequate education. It is integral to those problems. Many Americans, but especially those who are members of the groups that are the immediate beneficiaries of special admissions programs, live in

communities and belong to organizations that are defined in racial and ethnic terms. The direction of their loyalties and their sympathies are significantly determined by their racial and ethnic identifications. Whether, or to what extent, that is desirable is currently the subject of much debate. Such identification may, as some contend, lead only to divisiveness. Or, as others maintain, it may foster a sense of belonging and a pride in cultural origins. But whether it is good or bad, it is a reality with which law and the institutions of American life must contend.

In these circumstances, the question whether racial minorities are substantially represented in law school classes and at the bar assumes crucial importance. Gross underrepresentation of these groups has consequences quite different from those that would result from, say, gross underrepresentation of persons with one blue and one green eye. Individuals who share that characteristic have not historically been segregated by our society, nor otherwise subjected to generations of invidious discrimination. Governmental decisions do not affect them differently than they affect other persons and, conversely, their views on issues of public policy are likely to be distributed in the same way as in the general population. In each of these respects, individuals who share only a socially irrelevant characteristic differ from the members of racial minorities. And, as we now seek to demonstrate, it is precisely because of these differences that gross underrepresentation of the latter in law schools and at the bar is a pressing social problem.

A. The Need For More Minority Lawyers is Critical

The most important reason for special admissions programs in the law schools is, quite simply, that there is a critical need for more minority lawyers. The 1970 census, as noted above, reported that racial minorities, which constitute approximately 17% of the population, represented barely more than 1.9% of the bar. However dramatic, this gross statistic does not begin to convey the desperate shortage of minority lawyers. A 1968 survey revealed that before special admissions programs began to have an effect there were, in the entire South, only 506 black lawyers. In Mississippi, where the black population was nearly 1,000,000, there were 9 practicing black lawyers. In Alabama, with an even larger population of blacks, there were but 20 and in Georgia only 34.[39]

In drawing attention to this data, we do not suggest that any of the compelling reasons for increasing minority representation at the bar that are detailed below require representation proportional to the relative size of the minority. Opponents of special admissions programs have at times sought to characterize the programs as an attempt to achieve such representation among lawyers, an attempt that would, they then contend, necessarily imply maximum quotas for each racial and ethnic group in the profession. Stated bluntly, this objection is simply a "red herring." The data set forth in the preceding paragraph and elsewhere in this Brief demonstrate that neither now nor in the foreseeable future can there be any question of proportional representation in the bar. The serious question is whether publicly-supported schools can take steps to assure that the representation of minorities at the bar is to be more than negligible. Reasons of compelling social importance, to which we now turn, require an affirmative answer to that question.

1. The Public Role of the Legal Profession

Nearly 150 years ago, de Tocqueville described the crucial

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39. See Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069, 1073-74.

role of the legal profession in the United States. Lawyers, he wrote,

> are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and they conduct the administration; they consequently exercise a powerful influence upon the formation of the law, and upon its execution. 1 A. de Tocqueville, *Democracy in America* 329-30 (Schocken ed. 1961).

Time has added prescience to the keenness of these observations. Even more than in de Tocqueville's time lawyers now "form the highest political class" in the nation. No other professional group, no other single class of citizens, exercises or comes close to exercising as pervasive an influence upon the operations of government.

Of the nearly 400,000 lawyers in the United States today, approximately 50,000 are employed by federal, state, and local governments. They serve as legislators and as staff to legislatures; as policy makers, administrators, and litigators within the executive departments; and as judges and staff to the judicial system. Nor is the public role of lawyers confined to the public offices they hold. Acting on behalf of private interests, they exert a powerful influence on public policy, serving not only as intermediaries between citizens and their governments, but also as the architects of law reform aimed at making government responsive to the needs and interests of the citizenry. No less important, if often less fully appreciated, lawyers interpret the actions of government to their clients and their communities, and thereby serve a crucial role in achieving public understanding and acceptance of those actions.

The public influence of lawyers extends far beyond their formal roles in government or in representing clients in their dealings with government. Despite the importance of government in the modern world, the direction of our society and the quality of our national life depend not only, and

perhaps not even most importantly, upon the decisions of government, but also upon the myriad decisions made in the private sector. Here too the influence of lawyers is pervasive. Lawyers frequently serve as members of the governing boards, as well as advisors to, private foundations, educational and charitable institutions and corporations. They play an important role in the labor movement. They are often in positions of leadership in the extraordinary variety of community and other organizations that play so v tal a role in American life. In all these varied roles, lawyers are influential molders of public policy.

Because of the public importance of the legal profession, there is an imperative need that it include qualified representatives of the diverse groups that constitute our society. Since pre-Revolutionary times, Americans have been committed to the democratic ideal that government derives legitimacy from the consent of the governed, an ideal that we have historically understood to require the active and continuous participation of the governed in their government, either directly or by representation. For this reason, the frequency with which lawyers are elected to public office alone suggests the importance of increasing minority membership in the bar. But as the preceding paragraphs demonstrate, representation does not depend solely upon elected representatives.

In a society as complex as ours, representation throughout the vast network of public and private institutions which shape our national life is required to achieve the active and continuous participation in the governance of society upon which consent is founded. Decisions significantly affecting the lives of minority group members are made daily by zoning boards of appeal, transportation departments, regulatory agencies—everywhere that decisions are made affecting the lives of Americans. At times, perhaps often,

these decisions will have a different impact upon minority communities than upon the white community. A minority presence in the decision-making process increases the likelihood that those differences will be recognized and taken into account. Similarly, a minority presence in Wall Street law firms, corporate law departments, labor union legal staffs, law faculties, and the boards of foundations and community organizations—indeed, in all the institutions in which the influence of lawyers is felt—is likely to alter the behavior of those institutions in a host of subtle and perhaps not so subtle ways, making them more responsive to the varying needs of minority communities. No less significantly, the presence of minorities in these institutions provides evidence to the members of minority groups that these important centers of American life are open to their members, evidence that may be expected to have an important influence upon their acceptance of the institutional framework of American society.

A single illustration may help to demonstrate the urgency of increasing minority representation at the bar. One of the harshest indicators of the economic and social conditions of America's racial minorities is the fact that their members are disproportionately both the victims and the perpetrators of reported crimes. Nationwide, 28% of all persons arrested are members of a racial minority.[40] Unless the number of minority lawyers is raised beyond that which existed prior to the commencement of special admissions programs and which will continue in the absence of such programs, the consequence must be a system of criminal justice in which many of the defendants are black or Chicano but in which

40. Bureau of the Census, *Statistical Abstract of the United States*, Table 271, at 162 (1976). This figure, of course, does not demonstrate the criminal propensity of any ethnic group. It must also be viewed in light of socio-economic conditions and the possibility of selective enforcement.

nearly all judges, prosecutors, and even defense counsel are white. Given the history of racial injustice in the United States, it is not to be expected that such a system can maintain the respect and confidence of the minority communities that is so essential to its mission. We do not, of course, suggest that the fairness and credibility of the criminal justice system depend upon minorities or non-minorities being prosecuted, defended, or judged by members of their own groups. But we do maintain that the visible presence of minorities as prosecutors, defense counsel, and judges is essential to the appearance of justice, as well as to its reality.

The importance of a visible, and therefore a substantial, minority presence is obviously not limited to the criminal justice system. It exists wherever decisions are made that affect minorities, and that, as we have suggested, means that it exists wherever decisions are made affecting Americans. On the other hand, this is not the objective of special admissions since, of course, it is neither possible nor necessary to have minorities represented wherever decisions affecting minorities are made. But substantially increased numbers of minority lawyers will inevitably have the effect of rendering the decision-making processes of the system as a whole more cognizant of the distinctive interests of minorities.

2. Serving the Legal Needs of Minority Communities

Increasing the number of minority lawyers is necessary also to serve adequately the legal needs of the members of minority communities. In stating the existence of this need, we are mindful of the ideal eloquently expressed by Justice Douglas in his *DeFunis* dissent, that "[t]he purpose of [a state university] cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for the Irish. It should be to produce good lawyers for Americans." 416 U.S. at 342. This is a compelling

social and political ideal. Constitutional law ought not, however, in the single-minded pursuit of that ideal, ignore the existence of other values or the reality of the society in which we live. Although it would be absurd to suppose that only a Jewish lawyer can adequately represent a Jew or that only a black lawyer can adequately represent a black, it is true nonetheless that many Jews and many blacks (like many persons of other backgrounds) would prefer to be represented by lawyers with an ethnic and racial identity similar to their own. Nor should the existence of these preferences occasion surprise. Beyond the natural affinity which many persons feel with persons of a common cultural background, the history and in some measure the present reality of our society afford the members of some racial and ethnic minorities ample reason to perceive the dominant society as alien and to regard it with suspicion and even hostility. When the need for legal assistance arises, often at a time of anxiety or crisis, they may feel the need to turn to a lawyer whom they trust to understand and to empathize with their situation. Law schools need not endorse these feelings to recognize their existence and the importance of providing some outlet for them.

In a society in which racial and ethnic identities play an important role in everyday life, moreover, a lawyer's racial or ethnic background may have an important bearing on his ability to serve his client. Many of the tasks that lawyers perform for their clients require an understanding of the social context in which the client's problem arises. A brilliant and effective tax specialist is, for that reason, unlikely to be an effective representative in a labor negotiation. The reason is not simply that he is unfamiliar with the law of labor relations, it is also and perhaps primarily that he lacks an understanding of the practical problems of labor relations, of the customs that have developed in dealing with those prob-

lems, and of the style and manners of collective bargaining. To the extent that racial and ethnic groups form distinctive subcultures within our society, the representation of some of their members in connection with some of their legal needs may involve similar difficulties for the "outsider." The ability to "speak the language" of the client, to understand his perception of his problem, and to deal with others in the community on his behalf are qualities essential to being a "good lawyer." These qualifications are more likely to be found among lawyers who share the client's racial or ethnic identity, at least to the extent that the client's life is bound up in a community defined in these terms.

B. A Racially Diverse Student Body Is Important For A Sound Legal Education

At least since the time of Plato it has been understood that those who govern require an understanding of the governed. The need is common to all forms of government, but in a democracy it is critical. In the United States, as we have previously observed, lawyers play a crucial role in the governance of the nation. Successful performance of that role requires an understanding of the diverse elements that comprise our pluralistic society. The need for such an understanding is hardly less important to successful performance of the lawyer's role in the representation of private interests.

For these reasons, a major objective of legal education is to assist students in acquiring an understanding of the social environment within which legal decisions are made. It is inevitable that this understanding, so far as it can be gained in an academic setting, will be acquired largely from books. To a substantial degree, however, it is also acquired by interaction among students, through exposure to differing points of view in class discussion and in less formal settings. The importance of these interactions to the education of lawyers

was recognized by this Court more than a quarter century ago in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950): "[A]lthough the law is a highly learned profession," Mr. Chief Justice Vinson wrote for the Court,

> we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

The Court's concern in *Sweatt* was, of course, the need of black law students to interact with their white counterparts. But there is no less need for whites to interact with blacks.

The importance that the law faculties attach to achieving diversity within their student bodies is revealed in the admission practices described earlier. Of course, with respect to many of the characteristics that are socially significant in our pluralistic society, substantial heterogeneity is achieved without deviating from admission criteria concerned only with predicting the level of an applicant's academic performance. Thus, even though on the average white applicants from low income families have lower LSAT scores and GPAs than those from more affluent families, substantial numbers do qualify for admission, without special consideration, at schools which have varying admissions standards.[41] To the extent that diversity is not achieved in this way, the schools commonly rely upon non-academic factors to achieve it, always subject to the requirement that an applicant's predicted level of performance exceeds a school's minimum standards. Thus, some schools give preference to students from geographical areas that otherwise would not

41. *Evans Report* at 63.

be represented in their student bodies. Many, perhaps most, are likely to prefer a student who has an uncommon background—e.g., substantial experience in business or law enforcement or, perhaps advanced training in economics or psychology—to others who have scored higher on predictors of academic success. The admission decision in all such cases rests upon the judgment of schools that the existence of this diversity will contribute to the education of other students in the class.

In view of the importance of race in American life and the importance that it is certain to have for the indefinite future, it would be startling if faculties had not concluded that the absence of racial minorities in law schools, or their presence only in very small numbers, would significantly detract from the educational experience of the student body. As a consequence of our history, race accounts for some of the most important differences in our society. Precisely because race is so significant, prospective lawyers need knowledge of the backgrounds, views, attitudes, aspirations, and manners of the members of racial minorities. It is true, or course, that the members of a minority group often differ with respect to these characteristics, and that with respect to some or all of them some members of minority groups are indistinguishable from many whites. Encountering these diversities and similarities is, however, an important part of the educational process. Well intentioned whites, no less than bigots, need to learn that there is not a common "black experience" and to appreciate the oversimplification of such statements as "blacks want (believe, need, etc.). . . ." Moreover, the distribution of attitudes among blacks, or among the members of other racial minorities, undoubtedly is not the same as it is among whites. And that too is worth knowing. If the distribution of perceptions and views about politics or crime or family is different among the several minority groups than

among whites, that in and of itself may exert a shaping influence upon law and public policy, an influence to which law students must become sensitive if they are adequately to serve their future clients and perform successfully their future roles as community leaders.

The educational objectives of a minority presence in law school, finally, encompass more than increased understanding of minority groups. There is also a need to increase effective communication across racial lines. The difficulties that stand in the way of achieving such communication are not always obvious. Thus, an experienced law teacher has recently written:[42]

> I cannot imagine that any law teacher whose subject matter requires discussion of racially sensitive issues can have failed to observe the inability of some White students to examine critically arguments by a Black, or the difficulty experienced by others in expressing their disagreements with Blacks on such issues. Yet, these skills are not only a professional necessity, they are indispensable to the long-term well-being of our society.

We have developed the educational objectives of special admissions programs at some length because of their importance and because they are matters about which law teachers may claim to speak with special competence. The importance of those objectives has already and only recently been recognized by this Court, albeit in a somewhat different context. Thus in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16(1971), the Court acknowledged that it was within the authority of school officials to assign pupils by race "in order to prepare students to live in a pluralistic society." Most law faculties, with the approval of the governing bodies of their institutions, have similarly

42. Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. Chi. L. Rev. 653, 684 (1975).

concluded that the educational environment necessary to assure a sound legal education requires a racially integrated student body.

C. Minority Group Lawyers Will Contribute To The Social Mobility of Racial Minorities

The special admissions programs that have been undertaken by the law schools must be seen as part of a larger effort by the nation to improve the conditions of life of some of its most disadvantaged citizens. In part that effort involves an attempt to accelerate the growth of a "middle class" within those racial and ethnic minority groups that historically have been denied the opportunity to participate fully in the richness of American life. The justification for minority preferences within that overall strategy is not difficult to discern: because of the continuing importance of racial and ethnic identifications and loyalties, there is reason to anticipate that the strengthening of the black, Chicano, or Puerto Rican middle class through such preferences will have a catalytic effect. Increased numbers of black and Hispanic lawyers and other professionals should encourage the aspirations of black and Hispanic children. The organizational talent and financial resources of a minority middle class, experience suggests, will to some extent be put at the service of less advantaged members of minority groups. The hope, in short, is to set in motion a chain reaction leading to the break down of a complex of conditions that today condemn large numbers to lives of poverty and desperation.

But if this chain reaction is to occur it must begin. Professional education is the last step in a long educational process. The abilities of an applicant to compete successfully for law school admission is the product not only of 16 years of previous schooling but also of the applicant's cultural background, a background intimately related to the educational

attainments of the applicant's parents and of other adults who have influenced his or her development. Even if there were now to be immediate and effective compliance with the command of *Brown v. Board of Education*, and equal educational opportunity in primary and secondary schools were suddenly to become a reality, considerable time would have to elapse before the effect of these changes could significantly affect the number and quality of minority applicants to law school. The command of *Brown* is not completely obeyed, however, even after nearly a quarter century. And equal educational opportunity does not exist.

To deny professional schools the power to employ race-conscious admissions standards is, thus, to withhold from minorities, for a generation and perhaps longer, an important avenue of social mobility. The costs of withholding realistic opportunities for professional education from the current generation of minority students will not be borne only by them. It will be borne also by other members of minority groups who will be denied the service that would have otherwise been provided to their communities. It will be borne by the next generation of minority children who, like those of previous generations, will lack a visible demonstration of the potential rewards of aspirations and effort. And, not least, it will be borne by white Americans who, once again, will have failed to meet their commitment to achieve racial equality.

D. Special Admissions Effectively Respond To The Need For More Minority Lawyers

Measured simply by the number of students in school, there can be no question that the special admissions programs are a success: The number of minority law students has grown from 1.3% of the law student population in 1964 to 8.1% today. While this is less than half of the 17% minority population in the country, the law schools have never pro-

posed strict proportionality nor assumed that they could singlehandedly overcome the continuing obstacles created by the disadvantage suffered by minority groups throughout our society and particularly in primary and secondary education.

Success cannot be measured, however, by admission statistics alone. If it could, the schools could simply set quotas and admit the designated number of minority students without regard to their qualifications. They have not done so. Only 39% of the blacks who applied to law school in 1975 were admitted; this contrasts with the admittance rate of 59% for the whites.[43] What the law schools have done is to accept minority applicants who, considering all of the factors deemed relevant, are believed to be qualified to succeed, while in some cases putting an upper limit on the number who will be admitted on that showing.[44]

The question, nevertheless, remains as to whether the special admissions programs can be said to be successful in terms of actual performance in school and, after graduation, in passing the bar examination. And there is a further question: To what extent, if any, does the existence of special admissions programs have the effect of stigmatizing minority

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43. *Evans Report* at 37.

44. Probable success at a particular school may, of course, be quite different from probable success at another. Thus one eastern school with very high admissions standards, as shown by its profile, has a minority admissions program limited to approximately 10% of the entering class. See Fleming & Pollak, *The Black Quota at Yale Law School—An Exchange of Letters*, 19 The Public Interest 44, at 45 (Spring 1970). In this school the special admissions policy resulted in 1976 in no admission of any student with an LSAT below 550 and, below an LSAT of 600, none with less than a 3.5 undergraduate grade point average. *1976-77 Prelaw Handbook* 375 (1976). In 1972, the last year for which these figures are at hand, the median LSAT for that school's class as a whole, *including* minorities, was 723, for minorities, 648. *1972-1973 Prelaw Handbook* 345 (1972). To pick a random example at the other end of the country, the median LSAT at one school in that same year was 585, id. at 153, and, excluding special admissions, was 620 in 1976. *1976-1977 Prelaw Handbook* 153 (1976).

students as separate and unequal and thus impeding rather than accelerating the goal of an integrated society which these programs are designed to serve?

None of these considerations, as we show below, goes to the constitutional issue in this case. But they are important to the law schools and to the society which the schools serve, and we therefore address them. In so doing, we are frank to admit that the record is not perfect. The conduct of the educational enterprise involves judgment and, at times, experiments which are not always successful. Mistakes have been made. The appropriate corrective for these mistakes, however, is the schools' own interest in the success of their effort, rather than a constitutional bar which prevents them from making the effort. And the record is clear that the mistakes have, indeed, been largely corrected.

1. Success at School

The mistakes here have been of two varieties. The first was the notion that the absence of a strong educational background could be largely ignored. Some schools enrolled students who, it could reasonably be predicted, would have grave difficulty in meeting minimum standards of qualification but coupled their admission with intensive training and tutorial work during the summer before school began.[45] The notion that a lifetime of deprivation could be compensated for by a few months of intensive preparation proved to be naive and romantic, and it was quickly abandoned. The statistics given above (see p. 55, supra) as to the ratio of minority applicants to admittances demonstrate that the day has long since passed, if it ever existed except in a few cases, when the desire to enroll minorities meant that any

45. Hughes, McKay & Winograd, *The Disadvantaged Student and Preparation for Legal Education: The New York University Experience*, 1970 Tol. L. Rev. 701.

member of a minority group who applied was admitted.

A second, and related, error was the failure in some schools to give effect to the increased attrition rate necessarily implicit in the institution of special admissions programs. Even the best indicators of law school performance are predictions subject to error. Given the escalated standards which some schools were using for regular admissions in the third stage, the margin for error was so large that it became customary to expect that almost none who were admitted would fail. When these schools began to admit minority students whose predicted performance, while above the passing level, was below that of the regular admissions process, it should have been anticipated that the attrition rate would rise and would be concentrated predominantly among those specially admitted. Some schools failed to recognize this and regarded any substantial number of failures among admitted minority students as symptoms of failure of the program rather than as a necessary concomitant of success. Refusal by a school to admit applicants who have an 80% chance of success would result in denial of admission to 8 out of 10 who will succeed and to the 1 or 2 of that number who will succeed superbly. But the price of this 80% chance of success is a failure rate of 20%, unless something else is done, a fact not immediately recognized by some.

Tutorial programs were generally instituted in an effort to alleviate the attrition problem but here too a lack of experience sometimes resulted in ineffective programs. One common mistake was to assume that success of the programs would be enhanced if the number of those admitted were small. The effect, in many cases, turned out to be precisely the opposite. The introduction of a very small number of minority students into a previously all-white environment intensified pressures leading to poor performance which might not have existed if there were substantial representa-

tion from the minority groups.[46] In time and with experience, most of these difficulties have been resolved. Unfortunately, we have no statistics showing attrition rates by race for entering classes prior to 1971 and by that time the correction had been made by many schools. (The available figures are set forth in the Table and Chart below.) The figures for 1971 correspond to what one would expect. The attrition rate of all students had fallen from 38.4% in 1950 to 13% as law schools began moving from what we have called the second to the third stage of the admissions process and became increasingly selective in admitting students. But the attrition rate for minority students who first enrolled in 1971 was almost 23%, a rate comparable to the 26% rate for all students in 1965.

With the increase in the quality and quantity of minority applicants in the succeeding years the minority attrition rate has now fallen to approximately 17%. The trend is encouraging and indicates that the special admissions programs are in general working as they were designed to.

46. Id. at 711-712.

Table 1

ENROLLMENT AND ATTRITION

Year Entered	*First Year Enrollment*		*Adjusted Second Year Enrollment*		*Attrition Rate*	
	All Students	**Minority**	**All Students**	**Minority**	**All Students**	**Minority**
1950	16,411		10,111		38.4%	
1955	14,460		9,888		32.5	
1960	15,607		10,956		29.8	
1965	24,167		17,559		26.6	
1970	34,289		30,073		12.7	
1971	36,171	2,567	31,077	1,988	13.0	22.6%
1972	35,131	2,934	30,980	2,287	11.8	23.1
1973	37,018	3,114	33,489	2,602	9.5	16.4
1974	36,074	3,308	34,227	2,639	10.1	20.2
1975	39,083	3,413	35,189	2,845	10.0	16.6

Source: ABA, *Law Schools and Bar Admission Requirements* (1960)-(1978). This table was derived from enrollment data presented in each annual report of law school statistics. Second-year enrollments used in calculating attrition rates were adjusted by subtracting the number of second-year students in new schools approved after the count of first-year students for that entering class. Thus the first-year enrollments show all first-year students in ABA-approved law schools and the second-year enrollments show all second-year students enrolled the following year in those same schools.

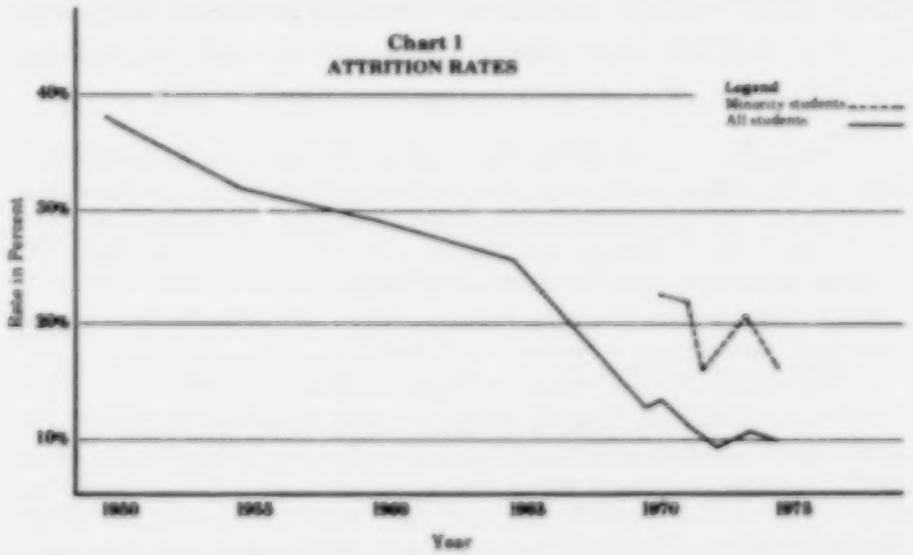
2. Success in Passing the Bar

The early errors, both in admission and in dealing with those admitted under special admissions programs, were also reflected in some cases in high failure rates of minority graduates in the bar examination.

Here again the evidence is that the mistakes have been corrected and that the picture is improving. National statistics on bar examination passage rates are not available by race or ethnic group.[47] However, a study was made in one state, California, as part of an effort to determine whether there was any racial or ethnic bias in the bar examination of that state. The study covered in full only the graduates of the law schools of California in the years 1970-73. It showed the expected increase in the number of minority graduates, from 59 in 1970 to 283 in 1973. It also showed that the percentage

47. For an admittedly incomplete tabulation focusing primarily on blacks taking the bar examination, see Hinds, *Keynote Introduction: "The Minority Candidate and the Bar Examination,"* 5 Black L.J. 123, 124-36 (1977). However, individual schools are often notified of the results of their graduates, from which some data has been gathered, and special programs such as CLEO seek to survey their participants to determine bar examination results.

Chart 1
ATTRITION RATES



of those passing the bar examination on the first attempt dropped from 51.9% in 1970, to 40.9% in 1971, and to 35.3% in 1972. In 1973, however, the percentage passing on the first time showed a slight increase, to 37.3%.[48]

We have no later figures for the state as a whole, but we do have figures from one of the larger schools which contributed to the 1970-1973 decline, the University of California at Los Angeles. These show that in the period between 1970 and 1973 the pass rate of minority graduates taking the bar examination for the first time was less than 21%. These were the students, it will be remembered, who were admitted at the very early stages of the special admissions program in 1967-1969. In 1973 the first-time passage rate rose to 23% and in the three years since that time the first-time passage rate has ranged between 39 and 50%.[49] Statistics from other states and programs such as CLEO could be examined to show a similar pattern.[50]

Failures on the bar examination reflect in part mistakes made in the early stages of development of special admissions programs and in part the risks that the law schools have willingly taken in establishing those programs.[51] These failures have, concededly, created tensions. But those tensions are the unavoidable price which must be paid for the achievement of a truly integrated bar.

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48. These figures are derived from Tables 1 through 4 of Appendix A to State Bar of California, *Report of Commission to Study the Bar Examination Process* (1973). They are summarized at California Legislative Analysis of the 1976-77 Budget Bill, *Report of the Legislative Analyst to the Joint Legislative Budget Committee* 820 (1976).

49. See Rappaport, *The Case for Law School Minority Programs*, Los Angeles Times, Opinions Section, p. 1 (Mar. 14, 1976).

50. See CLEO, *Annual Report of Executive Director* (1976).

51. For a further explanation of these developments, see Warren, *Panel on "Factors Contributing to Bar Examination Failure,"* 5 Black L.J. 149-52 (1977). See also Carlson & Werts, *Relationships Among Law School Predictors, Law School Performance, and Bar Examination Results*, LSAC 76-1, at vii (1976) ("The LSAT has a stronger relationship with bar examination performance than with law school grades.").

3. The Argument on Stigmatization

What has gone before raises the one serious question which many in educational circles and elsewhere have raised as to the desirability of special admissions programs. There is, concededly, a danger that the consequence of these programs may be to reinforce adverse stereotypes regarding intellectual capability and thus retard continued development toward the goal of equality. On balance, however, the law schools of this country have concluded that this danger is far smaller than the danger that these misconceptions will persist as the result of exclusion of minorities from the profession.

The argument has several threads. The first goes to whether in fact there is stigma attached to admission under a special admissions program as compared to the stigma of denial. Although it is true that minority students admitted under special admissions programs are somewhat lower on the predictors of law school performance, it is not true that unqualified applicants are being admitted. And although it is true that, on average, of those admitted by special admissions some will perform at a lower level than others, it is also true that some will perform far better. Finally, so far as we now know, the relative place on the scale of indicators and in law school grades is only very loosely related to relative competence in the practice of law. There are simply too many individuals—black and white—who have contributed substantially to the legal profession, though their law school careers were undistinguished, to treat relative grades let alone the predictors of those grades as constituting a mark of inferiority. On the other hand, the presence of substantial numbers of members of minority groups heretofore largely excluded from the profession means the addition of lawyers who, precisely because of their racial and ethnic characteristics, will be in a unique position to contribute to the integration of American life.

Secondly, the argument that special admissions programs should be abandoned because they stigmatize the preferred groups has a patronizing and paternalistic ring when uttered by those who complain that they are denied admission because others are given a preference. If the professional schools had imposed these programs upon a reluctant minority the argument might, nevertheless, be entitled to credence. But the fact is that once the law schools of this country let it be known in the minority communities that admission to the schools was possible under special admissions programs, the demand for their continuance and, indeed, enlargement, has been overwhelming. The outrage expressed by virtually every segment of the minority community at the decision of the court below bears testimony to the conclusion that a prohibition of special admissions programs on constitutional grounds will hardly be accepted as a benefit because it avoids stigmatization. We are confident that the briefs filed in this Court on behalf of those who would be excluded if the decision of the court below is affirmed will amply confirm that testimony.

Finally, the argument that the programs should be discontinued because of their stigmatizing effect, if it has a place, is properly made not in this case but in the educational and political forum. The complaint in this case is not that special admissions programs are unfair to blacks and other minorities and, hence, are unconstitutional. To the contrary, the complaint is that the programs are unconstitutional because they add a small number to the very large number of qualified white applicants who perforce must be denied admission to medical (and law) schools. There is, in this case, we assert, no place for the argument that the plaintiff should prevail on his constitutional claim because it will, in the end, be good for those who are the real defendants in interest.

III. SPECIAL ADMISSIONS PROGRAMS ARE FULLY CONSISTENT WITH THE CONSTITUTION

Since the parties, and no doubt other *amici*, will fully brief the Court on the constitutional issues raised by special admissions programs, we have thought we might render the greatest assistance by informing the Court of the imperative need for such programs in the law schools. We recognize, of course, that however compelling the need the programs cannot be justified if they transgress constitutional limitations. It may be appropriate, therefore, that we state briefly the reasons for our belief that the programs are fully consistent with the Constitution.

Students of constitutional law have expressed varying views about whether special admission programs should be subjected to "strict judicial scrutiny" or whether their validity should be judged under a more relaxed standard of review. Redish, *Preferential School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. Rev. 343 (1974). We do not enter this dispute, for it is abundantly clear that the programs survive the most exacting scrutiny.

To meet the test of such scrutiny, the Court has held, a governmental program must be "*necessary* to promote a *compelling* state interest." *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *In re Griffiths*, 413 U.S. 717 (1973). Section I of this Brief demonstrates, beyond any possibility of doubt, the necessity for the programs. Without them, only a negligible number of minority students would be enrolled in the nation's law schools. The programs are, moreover, aimed with precision at their objectives, racially integrating law schools and substantially increasing the number of minority lawyers. Nor is there any realistic prospect that those objectives can be met in any other way. Every alternative that has

been suggested would fail to produce any but a negligible number of minority students. Most would, in addition, have disastrous collateral effects upon the schools and the bar.

The only serious question, therefore, is whether the programs serve "a compelling state interest." Our reasons for believing that they do are set forth in detail at pp. 39-54, supra. We can conceive of no governmental interests more compelling than integrating the nation's law schools, increasing the number of minorities at the bar, and achieving equality for minority groups whose members have historically been denied opportunities that were their right as Americans.

The Court has not, of course, yet had an opportunity to speak directly to the issues in this case. Several of its recent decisions, however, strongly support our conclusion that the Constitution permits consideration of race in the service of goals such as those we have identified. We have already directed attention to *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) where the Court recognized the propriety of race-conscious school assignments designed "to prepare students to live in a pluralistic society . . . ." The propriety of race-conscious programs aimed at integrating other governmental institutions was implicit also in *Washington v. Davis*, 426 U.S. 229 (1976), where in rejecting the claim that Washington's selection criteria for police officers discriminated against blacks, the Court relied in part on "the affirmative efforts of the Metropolitan Police Department to recruit black officers. . . ."

Several cases decided during the past Term have recognized, even more directly, the propriety of governmental action aimed at redressing historic injustices within our society. Thus, in *United Jewish Organizations of Williamsburgh v. Carey*, 97 S. Ct. 996 (1977), the Court sustained a race-conscious reapportionment plan designed "to protect the opportunities for non-whites to be elected to public office" and thereby to assure fair representation of minorities in the legislature. In that case, as in the present one, there was no finding of past discrimination. But the Court held, "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." The governmental action was "broadly remedial" and, for that reason, fully consistent with the equal protection clause.

Similarly, in *Califano v. Webster*, 97 S.Ct. 1192 (1977), the Court sustained a formula calculating social security benefits that was more favorable to women than to men. To withstand constitutional scrutiny, the Court observed, "'classification by gender must serve important governmental objectives . . . .'" That test was met because "[r]eduction of the disparity of economic conditions between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." The challenged classification did not, the Court stressed, rest upon "archaic and overbroad generalizations," but upon a careful judgment of the need for preferential treatment if the effects of the historic discrimination against women were to be redressed.

Webster and *Williamsburgh* are controlling in the present case. Here, as in those cases, the purpose of the challenged governmental action is "broadly remedial," to overcome the effects of the historic discrimination against minorities. Moreover, special minority admissions programs do not rest upon "archaic and overbroad generalizations," but upon a solid foundation of information concerning the need for them if the compelling social objectives that they serve are to be met. Efforts will no doubt be made to distinguish *Webster* and *Williamsburgh* on the ground that neither involved the denial of a governmental benefit to an identifiable in-

dividual. But the fact that some students who might otherwise be admitted to law school are denied admission because of special admissions programs is not constitutionally relevant. Since the number of qualified applicants exceeds the places available, any selection criteria must exclude someone. The sole issue is whether the criteria employed are constitutionally permissible. In view of the compelling social needs that they serve, needs that could not be met in any other way, we believe that the admissions criteria employed in special admissions programs clearly meet that test.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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